Cts. 180 & 181.

Brief of Crane for P. in Err. & Appt.

Filed Dec. 6, 1897.

Supreme Court of the United States

Nos. 180, 181

JULIUS A. BRLEY, ET AL., *Plaintiffs in Error,* vs. JOSEPH NAPETALY, *Defendant in Error.* No. 180.	JOSIAH S. SMITH, *Appellant,* vs. JOSEPH NAPETALY, *Appellee.* No. 181.

Brief of Plaintiffs in Error and Appellant

HENRY F. CRANE,
For Plaintiffs in Error and Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JULIUS A. BELEY, ET AL., *Plaintiffs in Error,* vs. JOSEPH NAPHTALY, *Defendant in Error.* No. 180.	JOSIAH S. SMITH, *Appellant,* vs. JOSEPH NAPHTALY, *Appellee.* No. 181.

The leading question in the above cases, being the same, will be presented and submitted upon this brief in case No. 180.

STATEMENT OF FACTS.

This was an action by the defendant in error, against Julius A. Beley and twenty others, plaintiffs in error, commenced in the Circuit Court of the United States, Ninth Circuit, Northern District of

California, to recover possession of certain land situate in the county of Contra Costa, California, described in the complaint.

The defendant in error, for recovery against the plaintiffs in error, relied solely upon what purported to be two United States patents, dated February 28, 1893, one calling for 371.40 acres, the other for 566.16 acres of land (pp. 11 and 12 Rec.) purporting to grant the land to defendant in error.

The plaintiffs in error contend that the sales and entries by certain officers of the Land Department of these lands were void because the purported sales upon which the patents issued were not authorized by law, and hence that said patents are void, and pass no title to the defendant in error.

No reference is made, on the face of the patents, to any act of Congress, or law authorizing the sale of the land or the issuance of the patents, but the application of defendant in error to purchase (p. 13, fol. 24 Rec.) shows, that the sale was made and the patents issued under color of the provisions of Section 7, Act of Congress, entitled "An act to quiet land titles in California," approved July 23, 1866.

14 *U. S. Stat. at Large*, 218, or 2 *Lester's Land Laws*, p. 182.

The provisions of said Section 7, so far as affecting this contention, are as follows, viz:

"*Section 7. That where persons in good faith and for a valuable consideration, have purchased lands of*

*Mexican grantees or assigns which grants have been subsequently rejected . * * * and have used, improved and continued in the actual possession of the same, as according to the lines of their original purchase * * * such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section under regulations to be provided by the Commissioner of the General Land Office," etc.*

The defendant in error, upon the question of title, introduced in evidence on the trial the patents before mentioned, relying solely upon said patents as proof of his title to the lands in controversy.

For the purpose of showing that said patents were issued without authority of law the plaintiffs in error offered in evidence the following testimony:

1st. The verified application of defendant in error to purchase the land embraced in these patents from the United States, and other land; this document was sworn to and filed in the United States Land Office at San Francisco, August 10, 1883.

It is printed in full in the transcript, p. 13, fol. 24, to p. 15, and will be referred to for particulars.

Among other facts stated in this application is that one Inocencio Romero occupied the land in controversy from 1844 to December, 1853.

It is further alleged that said land formed part of a grant, made by the Mexican government in the year

1844 to Inocencio Romero and his two brothers, and that such grant or claim was afterward rejected.

For purposes of convenience we have here tabulated the statement as found in the application relative to conveyances from Romero, the *assumed* Mexican grantee, to his grantees in line, to defendant in error.

Inocencio Romero to Domingo Jujal et al	Dec. 26, 1853
Domingo Jujal et al to J. W. Tice	Feb. 14, 1855
J. W. Tice to A. J. Tice	Aug. 8, 1855
A. J. Tice to S. P. Millett	Oct. 15, 1859
S. P. Millett to D. P. Smith	1868
D. P. Smith to J. R. Spring	Feb. 1869
J. R. Spring to Martin Clark	Mch. 1869
Martin Clark to defendant in error	May 15, 1876

2d. The plaintiffs in error next offer in evidence the record of the Romero claim as the same appears upon the Mexican archives in the office of the Surveyor General in San Francisco. It is printed in full in transcript p. 15, folio 28 to p. 17, folio 31, for particulars see entire Mexican record above referred to. It shows simply an *attempt* to procure a grant from the Mexican Governor between January 18th and March 23d, 1844, of the land in controversy, which attempt appears to have been abandoned and no grant was ever issued by the Mexican Governor, as this record will fully show.

3d. The plaintiffs in error next offered in evidence the decision and judgment of the Board of Land Commissioners in the matter of said Romero claim on proceedings for confirmation thereof, presented February 28, 1853, (Vol. 8, Dec. Dept. Int. 147, bottom).

On April 17, 1855, the board decided "*that it does not appear that any grant was ever issued to any person*

and no equitable right appears on the part of any of the petitioners." Claim is rejected. (Rec., p. 17, folio 32).

4th. The plaintiffs in error next offered in evidence the decision and judgment of the U. S. District Court in the Romero case as reported in full in *1 Hoffman's Reps.*, 219, entitled *United States vs. Romero, et al.*

On October 5, 1857, the Court held and decided "*that no grant, either perfect or inchoate, was ever made, nor any promise given that one should be made.*" Claim rejected on that ground alone. See Rec., p. 18, 1 Hoffman Rep., 219.

5th. The plaintiffs in error next offered in evidence the decision and judgment of the U. S. Supreme Court, December term, 1863, on appeal in said cause, showing that the said judgment of the District Court was by the Supreme Court affirmed. *U. S. vs. Romero, et al.*, 1 Wall, 729, Rec., folio 33.

6th. The plaintiffs in error next offered in evidence the decision of William A. J. Sparks, Commissioner of the General Land Office, upon the matter of the application of defendant in error to purchase said land, whereby the commissioner holds that in view of the decisions of the Courts to the effect that no grant ever issued and no equitable right appears on the part of the petitioners and claimants, it must follow conclusively that the act of July 23, 1866, has no relevancy to the case in hand.

The entire opinion is printed in the record, commencing at bottom p. 18, ending folio 36, p. 20, dated March 2, 1887.

7th. The plaintiffs in error also offered in evi-

dence the opinion and decision of Hon. W. F. Vilas, Secretary of the Interior, of the United States, on appeal from said decision of the Commissioner of the General Land Office, wherein he affirms the decision of the Commissioner.

Reported in full, Vol. 8, Dec. of the Dept. of the Int., p. 144, *et seq.*

8th. The plaintiffs in error also offered in evidence the opinion of the Acting Secretary, Chandler, on motion for a review and reconsideration of said case, which motion was granted June 23, 1891.

Vol. 12, Dec. of Dept. of Int., p. 667.

9th. The plaintiffs in error also offered in evidence the opinion of Hon. John W. Noble, Secretary of the Interior, and successor in office to said Hon. W. F. Vilas, whereby the application of defendant in error to purchase said land was granted on the 18th day of May, 1892. See opinion in full Vol. 14, Dec. of Dept. of Int., p. 536. See also Rec., p. 20, fols. 36 to 37.

The defendant in error by his counsel then and there objected to the introduction of each and every of such records and documents in evidence on the ground that the same were immaterial, incompetent and irrelevant for the purpose of affecting the validity of said patents.

The Court sustained such objection, to which ruling the plaintiffs in error by their counsel then and there excepted. Rec. folio 37, p. 20.

The plaintiffs in error here rested, and the Court ordered judgment in favor of defendant in error in accordance with the prayer of the complaint.

A motion for a new trial was made, based upon a settled bill of exceptions (pp. 9 to 11, Rec.) Motion for new trial denied February term, 1895.

It will be seen that no question of fact is in issue in this case; it rests upon record and documentary evidence, all of which was before the Land Department. The case calls for a conclusion of law upon facts admitted.

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that a person could become entitled to purchase public land of the United States under the provisions of the seventh section of the Act of Congress of July 23, 1866, where no grant or semblance of a grant had ever issued from the Mexican Government to any person for said land, or any part thereof.

II.

The Court erred in holding that a person could be a purchaser in good faith under said seventh section of said statute where the records of the Mexican government relative to such claim failed to show that any grant or semblance of a grant had ever issued to any person.

III.

The Court erred in holding that a person could be deemed in law a purchaser in good faith under said statute where for more than two years prior to said

purchase the United States District Court had adjudged that no grant had ever issued, and where such judgment was in full force at the time of such purchase and has since continued to so remain in full force.

IV.

The Court erred in holding that defendant in error was a person who did on the 15th day of May, 1876, or any time, purchase in good faith said land of a Mexican grantee or his assigns, which grant had been subsequently rejected.

V.

The Court erred in holding that S. P. Millett was, on the 17th day of October, 1859, a person who had in good faith purchased said land of a Mexican grantee or his assigns, which grant had been subsequently rejected.

VI.

The Court erred in holding that after the defendant in error had been given a full and fair hearing upon his application to purchase said land by and before the proper officers of the Land Department, to-wit: the Commissioner of the General Land Office and the Secretary of the Interior, and where both of said officers had agreed in refusing and denying such right, that such decision was not final in the Land Department.

VII.

The Court erred in holding that a succeeding

secretary has the power to order in such a case as the foregoing a review and reconsideration of said case, and upon such review and reconsideration to ignore or reverse the decision of his predecessor, decide said case contrary to the former decision of the Department, reverse said decision, and grant the application of the defendant in error.

VIII.

The Court erred in assuming that said land (embracing about 3,000 acres in all) or any part thereof, has ever been enclosed in any manner, or has ever been surveyed, or has ever had any known or ascertained boundaries, or has ever been other than a mere settler's possessory claim.

IX.

The Court erred in holding that the right of purchase provided by said seventh section could not be made available until the public surveys had been extended over the land, and also in ignoring the provision of Section 7 of the statute which requires the purchaser to procure his claim to be officially surveyed like any private claim as a condition precedent to the right of purchase from the United States under said seventh section.

X.

The Court erred in assuming that plaintiffs in error as against the defendant in error (charged with holding under a void title) were confessedly naked trespassers on the land, because they could not con-

nect themselves with the title of the United States either by certificate of purchase, patent or anything of the kind.

XI.

The Court erred in holding that the evidence offered by the plaintiffs in error was immaterial, incompetent or irrelevant for the purpose of effecting the validity of said patents, and in sustaining the objection of defendant in error to said evidence.

ARGUMENT.

I.

By the terms of the seventh section, act of July, 23, 1866, persons who have purchased lands of supposed Mexican grantees or assigns must be deemed chargeable with notice whether or not said pretended grantees or assigns held the land under a Mexican grant or some semblance of one at the time of such purchase.

The purchase must be from a Mexican grantee or his assigns. It must be some semblance of a Mexican grant showing on its face a *prima facie* transfer of title to said Mexican grantee; such grant must have been rejected after the purchase mentioned in the statute.

The terms of the statute are not ambiguous; they require no construction, they are plain on their face; they have relation alone to persons who have in good

faith purchased land from Mexican grantees. The statute has no relation to cases where persons have purchased land of those who were not Mexican grantees.

It seems to have been the intent of Congress that these favored purchasers should have made their purchases from those who had some color of title, nothing short of a grant would show color of title under the Mexican system; many of these titles were rejected by reason of the failure to comply with some requirement of the Mexican statutes not appearing upon the grant. As matter of fact the Romeros had no color of title other than such as is implied from mere possession. Section 7 deals only with Mexican grantees which grants have been rejected.

It is presumption for a grantee of Romero to attempt to set up and indulge in speculations whether Romero may not have had a grant; no attempt seems to have been made to prove the fact in the Land Department. On the other hand, it was assumed that no grant ever existed.

This issue was tendered before the Commission, the United States District and Supreme Courts, and each adjudged that no grant had ever issued. That matter has been conclusively settled for over forty years as to Romero and his grantees.

The Romeros had no claim to present for confirmation. By act of March 3, 1851, having relation to the settlement of land claims in California, section 8 (1 Lester L. L., p. 176) the statute defines the status of claimants and the kinds of claims to be presented, viz: "*Every person claiming lands in California by virtue of any right or title derived from the Mexican*

* * * *government*" shall present the same, etc. Hence they had no such claim to present.

Since the rejection of the claim by the Commission, April 17, 1855, and the United States District Court, October 5, 1857, on the sole ground that no grant had issued, and those judgments still standing in full force and effect, there is no more room for speculation about the grant to Romero. From and after the latter date it became a mere possessory claim or range for cattle, and it stands virtually confessed on the record that the Hon. John W. Noble in May, 1892, permitted the defendant in error to purchase 3,000 acres of public land in Contra Costa county, California, being a portion of a possessory claim, all by virtue of the provisions of the seventh section, act of July 23, 1866. The statute did not authorize the act, and hence it was and is void.

II.

The statute further requires that the person shall have made his purchase from the Mexican grantee in good faith.

It has been held that a purchaser in good faith, within the meaning of this seventh section, is one who purchases in the sincere and fair belief that he is acquiring a good title to the land purchased and is chargeable with no notice of defects in that title, which may operate to defeat it, and especially one who is not chargeable with notice that he is purchasing only a speculative title.

Vol. 8, Decis. Dept. Int., p. 148.

The defendant in error made his purchase from a remote grantee of Romero, May 15, 1876, that was over twenty years after the claim had been rejected by the commission, and about eighteen years after it had been rejected by the United States District Court. It is conceded that *he* was not a purchaser in good faith, but in the court below he claimed the right to rely upon the purchase of S. P. Millett who made his purchase October 17, 1859. In 1868 he made a conveyance of the land to D. P. Smith (folio 26, p. 14). Smith conveyed to Spring and Spring conveyed to Clark and he conveyed to defendant in error.

If Millett acquired the right to purchase from the Government it was a mere personal right, not running with the land, and a mere conveyance of the land would not pass such right to the purchaser.

But Millett was not a purchaser in good faith. We have shown that the Romero claim was rejected by the Commission in 1855, and by the United States District Court on October 5, 1857. Millett purchased on October 17, 1859, two years after the judgment of the District Court had been of record. By that judgment not a shred of Mexican title remained, and the Romero claim was rejected. Millett purchased when affairs were in that condition. All he acquired was a rejected claim never granted by the Mexican government, and rejected for that reason alone.

In fact all he got was the possession of the tract of land, the right to conduct an appeal pending therein from the above judgment resulting in the affirmance of the judgment. Under all these circumstances Millett must be presumed to have known the condition of the title he was buying. Nothing is said in

the record in reference to the purchase being in good faith or for any consideration. The fact was, his purchase was a gamble on the decision of the Supreme Court, a pure speculation, and a bad one. It is conceded that none of the grantees from Romero prior to Millett's purchase ever acquired any interest under the seventh section, act of July 23, 1866, for the simple reason that each of them parted with all his interest in said claim before the passage of the act of July 23, 1866. Millett held possession until 1868, never claiming any right to purchase the land from the United States; he virtually purchased a lawsuit; he could not have purchased in the sincere and fair belief that he was acquiring any title under a Mexican grant. He knew the two judgments standing on record utterly defeated the Mexican title, and that such title was in imminent peril by the affirmance of the judgment of the District Court. The records of the Mexican government, the decree of the Land Commission, and the judgment of the United States District Court each showed that no grant ever issued for this claim. After July 23, 1866, it is quite significant that seventeen years elapsed before any move was made to purchase this land from the United States, and upon the theory of defendant in error there were five purchasers in that period who could have done so.

III.

We submit that the purchase from the United States provided for by the seventh section, act of July 23, 1866, has relation to the purchase of a definite tract and not an undivided interest.

The deed given by Romero to Domingo Pajole, et al., dated December 26, 1853, upon which all subsequent deeds are made, calls for *all the undivided one-third* of the land contained in the Romero claim. All subsequent conveyances call for the same undivided interest.

See 8 Decis. Dept. Int., 149 and 151.

We submit that the statute does not contemplate the purchase of an undivided interest, it relates alone to a definite tract, susceptible of being used, improved and held in several and actual possession by the purchaser according to the lines of his original purchase. It also requires him to have the same surveyed before he makes application to purchase.

Several of the most important requirements of the statute could not be performed in case of a sale of an undivided interest. In fact this Romero range, and none of it, has ever been surveyed. It has never been fenced except on paper (see diagram between pp. 14 and 15); it has never had any known or ascertained boundaries. Defendant in error did not apply to purchase until the public surveys were run over the tract at the expense of the United States. He then makes application for sections, quarter-sections and fractional sections. Assuming that he

has a roving commission to select and take tracts as please him, this is of itself a plain violation of Section 7, act of 1866, and an open and manifest fraud upon the rights of *bona fide* settlers. The act of July 23, 1866, makes it mandatory and a condition precedent to the purchase itself, that the purchaser shall have the lands surveyed under existing laws; this survey must precede the purchase that the land offices may keep the account on the town plats like any other private claim.

We submit that the seventh section, act of 1866, does not authorize purchasers of undivided interests in Mexican claims to purchase such lands from the United States, and by the terms and material requirements of the seventh section it would seem plain that such purchases must be excluded; upon the rejection, the land becomes public land. How is this purchaser of an undivided interest to show that he has used, improved and continued in the actual possession, according to the lines of his original purchase? How is such interest to be segregated from the entire tract?

IV.

We have in this case the decision of one Land Deparment to a finish and completion. Then an order to review and reconsider by certain successors in office, and upon a review and reconsideration of the same case an adverse decision.

We submit that the first decision is sound and the second unsound.

This matter came regularly before the Commissioner of the General Land Office some time prior to March 2, 1882, for a hearing and decision, and on that date, after a full hearing the Commissioner found and decided (following the decisions of the Courts and other records) that no grant or semblance of a grant ever issued for the Romero claim, that Romero had no right or title derived from the Mexican government, and hence the act of July 23, 1866, Section 7, had no relevancy to the case, and the right of defendant in error to purchase be denied.

This decided as a question of law that the officers of the Land Department had no authority to sell said land under Section 7, to the defendant in error.

The Commissioner also decided that the statute only applies to persons who purchased prior to the rejection of the supposed grant or claim. As to the latter point see Vol. 8 Dec. of Dept. Int., p. 145, bottom.

On an appeal from the above decision the Honorable Secretary of the Interior, W. F. Vilas, on the 4th day of February, 1889, after a full and careful consideration of the case, affirmed the decision of the Commissioner. This ended the case before the Department; there was nothing more to be done; it was a final decision of the Department.

See Opinion of Secretary Vilas, Vol. 8, Decis. Dep. Int., 144.

The Department rejected the application of defendant in error on the following grounds:

1st. Because Romero never had a Mexican grant, or any claim or title derived from the Mexican Government.

2d. That the purchase was not made until after the claim had been rejected.

3d. That the purchase was not made in good faith, but was merely a speculative purchase.

On motion for review Mr. Assistant Secretary Chandler disposes of points first and second by saying that Secretary Vilas overruled the Commissioner on these points; that would not dispose of the question if true, but it is not true. Mr. Secretary Vilas says that he is not prepared to place his decision on that ground alone, but is disposed to place his affirmance of the Commissioner's decision upon other grounds in respect to which the fact finally decided by the Supreme Court is of consequence as a matter of evidence upon the question of good faith.

Vol. 8, Dec. Dept. Int., p. 148.

The Assistant Secretary labors to show that the Romeros made a parol partition of the claim, and asserts that in his opinion they did. In my opinion they did not, but it is not very material.

Afterwards he says: "but the question to be determined at this time is, did Romero sell a tract of land definite and specific as to boundaries?" He settles this question as follows, viz: "In my opinion the answer to this question must be in the affirmative."

Vol. 12, Dec. Dept. Int., p. 672.

We call attention to the deed itself (Vol. 8, Dec. Dep. Int., p. 149) calling for "*all the undivided one-third* of the lands and ranchos in Contra Costa county," etc.

It is quite clear that Assistant Secretary Chandler had some anxiety to decide this case in a certain way.

On May 18, 1892, Secretary Noble gave a second opinion, in which he devotes eight pages to the question whether a deed made to one Urhetta Tice was made for a valuable consideration or not.

Vol. 14, Dec. Dept. Int., p. 536.

We are not in a position on this question of good or valuable consideration to comment, because the defendant in error has not placed this lady in the line of his grantors.

The points in the case which are adverse to defendant in error, and which defeat him, were by these latter gentlemen ignored and smothered with indifference and neglect.

We submit that the decision of Secretary Noble and his assistant presents this anomaly, viz: that a person by virtue of having purchased a stock range in California of about 3,000 acres out of the public lands of the United States, acquiring no title thereby except possession, has by such purchase and the provisions of the seventh section of the act of July 23, 1866, become entitled to purchase the same land of the United States at $1.25 per acre, and have issued to him U. S. patents therefor.

V.

On the trial it was conceded by counsel for defendants that they did not propose to connect themselves with the title of the United States to the premises described in the complaint, either by certificate of purchase, patent, or anything of the kind.

(Record, p. 13, top.)

This concession was asked of us by the defendant in error, and conceded in the terms he asked it.

Upon this alone the Court asserted in its opinion that these persons are all naked trespassers (p. 30, fol. 55, at bottom, also page 37 last paragraph) and as to them these patents are conclusive, the defendants being bare intruders. We deny that the admission was more than a concession that they could not so connect themselves by any kind of paper title.

We submit this is not a confession that they were naked trespassers or bare intruders upon public land subject to settlement and disposal under the laws.

Should this Court desire to know the status of the most of the defendants in the Court below, let them read the complaint in *Smith vs. Naphtaly*, No. 181, as a part of this brief.

The only grounds of objection to the introduction of each of the above documents in evidence were general, viz: that it was *immaterial, incompetent and irrelevant* for the purpose of effecting the validity of said patents. Record, p. 20, folio 37.

There was no objection in the Circuit Court on the ground of the status of the defendants, and the point cannot be made on appeal for the first time.

Non constat these defendants may be in possession as pre-emption or homestead settlers having some inchoate claim something less than a paper title.

But the cases show that mere possession is sufficient to enable a defendant to attack a patent by showing that it was issued without authority of law.

In *Patterson vs. Winn*, 11 *Wheaton* 384, by the Court: "We assume it as the settled doctrine of this Court that if a patent is absolutely void upon its face, or

the issuing thereof was without authority, it may be impeached collaterally in a court of law in an action of ejectment."

Polk's Lessees vs. Wendal, 9 *Cranch*, 99.
Wilson vs. Jackson, 13 *Peters*, 509 to 511.

Held that where an officer of the Land Department attempts to dispose of land not embraced by the provisions of the law he acts without jurisdiction.

Best vs. Polk, 18 *Wall*, 112.
Smelting Co. vs. Kemp, 104 *U. S.*, 644 and 645.

It is said: "A patent may be collaterally impeached in any action and its operation defeated by showing that the Department had no jurisdiction to dispose of the land, that is that the law did not provide for selling the same."

Steele vs. Smelting Co., 106 *U. S.*, 452 and 453.

If no legislation authorized their sale * * * the patent would be inoperative to pass the title, and objection could be taken to it on these grounds at any time and in any form of action. *Reynolds vs. Iron Silver M. Co.*, 116 *U. S.*, 687 and 698, Chief Justice dissenting on sole ground that defendants had no title other than possession.

Wright vs. Roseberry, 12 *U. S.*, p. 519.
Doolan vs. Carr, 125 *U. S.*, 618.
Burfenning vs. Chicago, &c. Ry., *163 U. S. 331.*

Chief Justice dissented on the ground that defendants had no claim of title in latter case.

In this case we ask the Court to determine the question of the validity of said sales and patents;

that the evidence offered on behalf of the plaintiffs in error was and is competent and relevant to show that said sales were allowed and said patents issued without authority of law, and that said patents are void, and convey no title to the defendant in error.

That the judgment of the Circuit Court be reversed and a new trial be granted.

Respectfully submitted,

HENRY F. CRANE,

Attorney for Plaintiffs in Error.

SUPPLEMENTAL BRIEF.

JOSIAH S. SMITH,
Appellant,

vs.

JOSEPH NAPHTALY,
Appellee.

No. 181.

This case proceeds upon the theory embraced by the provisions of Section 738 Code of Civil Procedure of the State of California, which is in words and figures as follows, viz:

"*Sec. 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.*"

A demurrer was sustained to the complaint on the ground that it appears upon the face thereof that the

complainant has a plain, adequate and complete remedy at law.

In this the Court erred. The Court also erred in holding that appellant had no such interest in the land as would entitle him to question the validity of the patent issued to appellee.

The Court erred in holding that this suit could not be maintained under Section 738 Code Civil Procedure, California.

The appellant shows such an interest in the land as will entitle him to maintain this action. (Rec. pp. 1 to 5).

Shepley vs. Cowan, 91 *U. S.*, 330-338.
Ard vs. Brandon, 156 *U. S.*, 537.

This suit can be maintained under Section 738 Code of Civil Procedure of California.

Holland vs. Challen, 110 *U. S.*, 15.
Reynolds vs. Crawfordsville Bk., 112 *U. S.*, 410.
U. S. vs. Wilson, 118 *U. S.*, p. 89.
Whitehead vs. Shattuck, 138 *U. S.*, 146.

The doctrine of the last four cases is, viz: that the Federal Courts will entertain suits under such special statutes in States where adopted, except in cases where it appears that complainant has a plain, adequate and complete remedy at law.

Whitehead vs. Shattuck, *supra*.

The claim of a person as a pre-emption settler under United States pre-emption laws entitles him to

maintain a suit under Section 738 to determine an adverse claim in this State.

Wilson vs. Madison, 55 Cal., 5.
Pralus vs. Pac. G. & S. M. Co., 35 Cal., 30-34.
Orr vs. Stewart, 67 Cal., 275.
Stoddard vs. Birge, 53 Cal., 18 and 399.
Coleman vs. S. R. T. R. Co., 49 Cal., 520.

We submit this case upon briefs numbered 180 and 181. If the Court should hold that said sale of land mentioned in said patents (pp. 11-12 Rec, 180) was and is a valid sale, both cases are at an end. If on the other hand said sale and patents should be adjudged invalid and void, then we ask that the judgment herein be reversed and the demurrer be overruled, and that the Circuit Court be directed to enter judgment herein in accordance with the decision of this Court and the prayer of the complaint herein, besides costs.

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